



Administrative
Appeals Tribunal

**DECISION AND
REASONS FOR DECISION**

QKVH and Minister for Home Affairs (Migration) [2018] AATA 1855 (20 June 2018)

Division: **General Division**

File Number: **2016/5428**

Re: **QKVH**
APPLICANT

And **Minister for Home Affairs**
RESPONDENT

DECISION

Tribunal: **Deputy President S A Forgie**

Date: **20 June 2018**

Place: **Melbourne**

The Tribunal decides to affirm a decision of the respondent dated 21 September 2016 refusing to grant a Partner (Temporary) (Class UK) visa to the applicant under s 501 of the *Migration Act 1958*.

.....[sgd].....
S A FORGIE
Deputy President

MIGRATION – refusal to grant visa – risk of applicant engaging in criminal conduct – failure to pass character test – exercise of discretion – decision affirmed.

Legislation

Acts Interpretation Act 1901

Legislation Act 2003

Migration Act 1958 ss 5, 29, 30, 31, 52, 499, 500, 501, 501CA

Migration Regulations 1994 r 1.03

Cases

Brennan v Comcare [1994] FCA 1147; (1994) 50 FCR 555; 122 ALR 615; 19 AAR 542

Damjanovic & Sons Pty Ltd v The Commonwealth [1968] HCA 42; (1968) 117 CLR 390

Dolan and Australian and Overseas Telecommunications Corporation [1993] FCA 202; (1993) 42 FCR 206; 31 ALD 510

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24; 66 ALR 299

Minister for Immigration v Baker (1997) 73 FCR 187; 153 ALR 463; 45 ALD 136; 24 AAR 457

Minister for Immigration v Jia Legeng [2001] HCA 17; 205 CLR 507; 75 ALJR 679; 65 ALD 1; 178 ALR 421

Ogden Industries Pty Ltd v Lucas [1970] AC 113; [1969] 1 All ER 121

Re Beckner and Minister for Immigration, Local Government and Ethnic Affairs [1991] FCA 264; (1991) 30 FCR 49

Re CBYQ and Minister for Immigration and Border Protection [2018] AATA 91

Re KQHR and Minister for Immigration and Border Protection [2018] AATA 684

Re Maikantis and Minister for Immigration and Border Protection [2018] AATA 40

Re Visa Cancellation Applicant and Minister for Immigration and Citizenship [2011] AATA 690

Secretary, Department of Social Security v Ekis (1998) 85 FCR 382; 52 ALD 246; 28 AAR 36

Ueese v Minister for Immigration and Border Protection [2016] FCA 348; (2016) 248 FCR 296

Williams v Minister for Immigration and Citizenship [2013] FCA 702; (2013) 136 ALD 299

YNQY and Minister for Immigration and Border Protection [2017] FCA 1466

Other Material

Chambers 21st Century Dictionary, 1999, reprinted 2004

Direction Number 65

REASONS FOR DECISION

Deputy President S A Forgie

1. A differently constituted Tribunal affirmed a decision made by a delegate of the then Minister for Immigration and Border Protection (Minister) on 21 September 2016 refusing to grant a Partner (Temporary) (Class UK) visa to QKVH.¹ On 28 August 2017, the Federal Court issued a writ of certiorari directed to the Tribunal quashing its decision and issued a writ of mandamus requiring it to determine the application made to it for review of the decision according to law. The Federal Court did so by consent but neither appended a statement setting out the grounds on which the orders were made nor made directions regarding the hearing on remittal. As a consequence, I have heard the matter entirely afresh without regard to evidence given in the previous hearing unless it was given or admitted in evidence in the proceeding before me. I have decided to affirm the delegate's decision.

LEGISLATIVE BACKGROUND

Visas

2. Subject to the terms of the *Migration Act 1958* (Migration Act), the Minister may grant a non-citizen² permission either to travel to and enter Australia or remain in Australia. That permission takes the form of a visa.³ A visa may be subject to conditions. It may be permanent, allowing the person to remain in Australia indefinitely, or it may be temporary, allowing the person to remain during a specified period, for a specified event or while the holder has a specified status.⁴ There are various classes of visa set out in s 31(2) and others may be specified in regulations made under the Migration Act. Regulations may specify the criteria that must be met for a visa of a specified class⁵ as do specific provisions of the Migration Act.⁶ Quite apart from circumstances in which an applicant for a visa

¹ As the applicant made a non-refoulement claim in his written evidence, I made an order under s 35 of the *Administrative Appeals Tribunal Act 1975* to the effect that he will be known as "QKVH" in these proceedings.

² A non-citizen is a person who is not an Australian citizen: Migration Act; s 5(1).

³ Migration Act; ss 5 and 29(1)

⁴ Migration Act; s 30

⁵ Migration Act; s 31(3)

⁶ See, for example, s 36 in relation to protection visas.

fails to meet the relevant criteria, s 501 sets out circumstances in which the Minister may refuse to grant a visa. They arise if the person fails to meet the character test set out in s 501(6) of the Migration Act with reference to s 501(7) to (12).

Refusal under section 501 of the Migration Act

3. Section 501(1) provides that:

“The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: Character test is defined by subsection (6).⁷

The Minister may refuse to grant a visa if he reasonably suspects that the person does not pass the character test and he is satisfied that the refusal is in the national interest.⁷

4. The character test is set out in s 501(6). Only ss 501(6)(c) and (d)(i) are relevant:

*“For the purposes of this section, a person does not pass the **character test** if:*

...

(d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:

(i) engage in criminal conduct in Australia; ...

...”

Minister’s directions regarding exercise of power under section 501(1)

5. Section 499 of the Migration Act provides that the Minister may give written directions to a person or body having functions or powers under that Act provided the directions are about the performance of those functions or the exercise of those powers.⁸ Those directions must not be inconsistent with the Act or the Regulations made under it.⁹ The person or body to whom the directions are given must comply with them.¹⁰ The Minister has made a direction under s 499 for the purposes of decisions made under, among others, s 501(1). It is known as “*Direction No. 65*”. In so far as a decision under s 501(1) is concerned, Direction

⁷ Migration Act; s 501(3)

⁸ Migration Act; s 499(1)

⁹ Migration Act; s 499(2)

¹⁰ Migration Act; s 499(2A)

No. 65 gives direction both in relation to whether or not a person passes the character test under s 501 and, if the person does not, whether that person should be refused a visa.

BACKGROUND

6. QKVH grew up in Pakistan. He described his family as a well off middle-class family and his life in Pakistan as very comfortable. Despite this comfortable life, QKVH wanted to “*make something for himself*” so he came to Australia on 7 April 2007 to study a Diploma of Commerce at Melbourne Institute of Business and Technology Pty Ltd (MIBT) with the intention of undertaking a Bachelor of Commerce at Deakin University. He was granted entry to Australia pursuant to a Subclass 572 student visa and subsequently applied for and was granted work rights on his student visa on 10 July 2007. QKVH completed his diploma in 2009 and commenced a Bachelor of Commerce soon after. He was a relatively successful student, played sport, and attended social events at the University, he made a strong group of friends. Between 16 September 2008 and 26 October 2008 he returned to Pakistan to visit family.
1. 7. QKVH met a person, whom I will call “*Valentina*” in August 2008. QKVH described events in a statement dated 6 March 2015:
 2. “... [I] fell head over heels in Love with her, and my world revolved around her, I started to miss my own uni to be with her, I stopped hanging out with my friends and fully dedicated myself to our relationship, when I found out that my partner ... had some very complex medical conditions, I left everything to be with her, to give her my 100 per cent support, she had several admissions to hospital and I was there with her every single day to support her, as she is my world and the Love of my life, but while I was with my partner my studies at Deakin got affected, and as a result I think I dropped out of Deakin, and Deakin informed DUIAC that I’m, no longer enrolled with them, which in effect affected my visa. I found myself in alien circumstances which were un known to me, as I came from a very good strong family, and here I was dropped out of uni, but being with my Partner made my life beautiful and worth living, and supporting her during her hospital admissions became the goals of my life. The Love to my partner became my religion, and our relationship our heaven, but I knew we had to fight for our relationship to be together, as I think DIAC cancelled my visa as I was not enrolled in any uni, and while my partner was in hospital my focus was solely on her health and wellbeing, and I forgot everything else, at one stage while she was in hospital I remember as I did not had any work rights and no money I was living in my car, and at the time my license was suspended as I have made the mistake of getting a local license, whilst I did had an international full license, but when I got the local license

at the time I had to start from L's on my car, i had no knowledge of such technicalities, and no money to get legal advice and the magistrate then suspended me from driving, but at that stage my partner was in hospital, and my focus and responsibility was solely on her wellbeing and supporting her, and didn't care much about myself at the time, I had no support at the time, and was not allowed to work, and I had no option but to live in my car, I cannot stress enough that without any support the whole situation was very alien to me, but my focused remained to Love and Support my partner while she was in hospital, sometimes I had to move the car locations from one parking lot to another and once the police stopped me and I explained them truthfully the situation and I had to go to court again to face charges of driving while authorisation suspended. And it wasn't long that one day when I arrived home (to my car) from my partner's hospital that I found out that my car is missing, I reported it to the police and they advised me that the dandenong city council has towed it away and I need to pay them the towing cost as my car was slightly on the footpath to get my car and belongings back, as my car was my home at the time and everything I owned and my clothes were there, I explained that to the dandenong city council ... but they in return refused to return my car unless I paid them the towing costs for the money I never had and I did not agree with them that why did they take my car, they advised unless I paid them that money within a certain amount of time they will recycle my car ... again my main focus was my partners health, and the Dandenong city council took my home (my car) from me and recycled it along with all my belongings. So now I was in the streets, without any belongings or clothes or anywhere to sleep, but I loved my partner so much and she loved me so much, that I believed that Love conquers all, and I still supported her during her long time in hospital.”¹¹

3.

4. 8. Early in the relationship QKVH proposed to Valentina. She accepted his proposal and they both wanted to marry immediately. QKVH sought advice as to how they could marry and, when told that they had to give a month's notice, decided to wait so that they could have a big wedding attended by all of his family. He said in his statement dated 15 March 2018 that they have not yet had the opportunity to marry and will defer it until his visa situation is sorted out.¹² Their relationship continues to the present, they have been together for approximately 10 years. Valentina suffers from multiple serious mental health issues, including mania and psychosis. QKVH, in his statutory declaration dated 15 March 2018, said he:

“15. ... committed fully to [Valentina], and neglected my university commitments to spend time with her. I took her to appointments, and I encouraged her to pursue her passions for fashion by trying to help her set up a clothing business (although this was not successful) and I provided

¹¹ Exhibit 2, volume 2 at 635-636

¹² Exhibit A at [13]

financially for her as well where needed. [Valentina] was unable to successfully hold down employment due to her health, so went [sic] spent a lot of time together during the days and at that time, my main priority was making her happy and enjoying our relationship.”¹³

9. I will set out the background to this case in tabular form and then expand on some of the entries in light of the evidence.

Date (Date of Conviction)	Visa status (Application)	Life events (Further information regarding visa applications)	Offences charged (Court)	Court result (Administrative review decision)
November 2006		In the University of Cambridge International Examinations, QKVH was awarded 91% in a subject described as “General Paper Advanced Subsidiary”.		
7 April 2007		Granted a Vocational Education and Training Sector Visa (Subclass 572).		
20 May 2007	Holder of Student (Temporary) (Class TU) visa	QKVH arrived in Australia and commenced studying for a Diploma of Commerce at the Melbourne Institute of Business and Technology Pty Ltd (MIBT). He was the captain and coach of MIBT’s soccer team. ¹⁴ QKVH was picked up from the airport by a family friend of QKVH’s family, whom I will call “AFF” and they were in contact intermittently. AFF said in his oral evidence that QKVH was a very good boy and very focused in 2007.		
10 July 2007	Given permission to work while holding a student visa.	QKVH held various jobs between July 2007 and 2011 but, on the basis of his Statutory Declaration made on 15 March 2018, I find that, after he met Valentina, he “... was unable to commit fully to my employment because ... [Valentina] would often call me during work with an emergency and I would be required to leave to be with her, and eventually my bosses would get fed up with this and I would lose my job.” ¹⁵		
23 August 2008		QKVH met Valentina at a nightclub in Melbourne. She migrated to Australia as a baby with her family and became an Australian citizen on 26 January 1995. ¹⁶		
16 September to 26 October 2008		QKVH travelled to Pakistan for a holiday.		
In or about 2009		Commenced study for a Bachelor of Commerce at Deakin University. QKVH met a friend, whom I will call “AH”. AH completed a Bachelor of Arts in 2012 and a Masters in Media in 2017. QKVH worked as a volunteer in the aftermath of the Black Saturday bushfires in Victoria by collecting donations as part of a Telethon conducted by his employer at the time. ¹⁷		
26 March 2009		Awarded a Diploma of Commerce by MIBT.		

¹³ Exhibit C; Annexure 1

¹⁴ Exhibit 2, volume 2 at 635

¹⁵ Exhibit A at [11] and [35]

¹⁶ Exhibit A at [11.1]

¹⁷ Exhibit B at [9] and see also statement of AH: Exhibit D at [19]

6 January 2010		Use unregistered motor vehicle. Drive Whilst Authorisation Suspended.		Charges heard on 17 January 2011.
In or about January 2010		Based on a Bank Statement beginning 1 May and ending 31 July 2011 and on its being Statement 6, I find that QKVH and Valentina opened a joint bank account in or about January 2010. ¹⁸		
15 January 2010		Enter intersection against a red traffic light. Drive Without L Plate Displayed. Learner Driver Drive Without Experienced Driver. Use Unregistered Motor Vehicle. Drive Whilst Authorisation Suspended.		Charges heard at Frankston Magistrates Court on 17 January 2011.
29 January 2010		Apprehended leaving David Jones store without paying for perfume and questioned by police regarding possession of other goods being a large kitchen knife, silver coloured necklace with price tag of \$49.96 attached, pair of Levis blue coloured shorts, Jag grey t-shirt with price tag of \$49.95 attached and two Adidas branded block-coloured sport singlet tops with tags located loosely in a bag in QKVH's possession. Charged with Theft/Shopsteal, Possess Controlled Weapon Without Excuse and Possession of Property Suspected of Being Proceeds of Crime. ¹⁹		Charges heard on 25 July 2011.
August 2010		Valentina was in regular receipt of Disability Support Pension payments from 10 August 2010. Together with the Pharmaceutical Allowance and the Youth Disability Supplement, they rose to \$360.80 per fortnight from 21 September 2010. ²⁰		
22 August 2010		Incident at cinema involving QKVH, Valentina and a group of other people. Recklessly Cause Injury.		Charges heard on 17 August 2011.
November 2010		From November 2010 until June 2011, QKVH "... accessed Salvation Army Crisis Service assistance for material aid, accommodation and advice and information on several occasions between November 2010 and June 2011." ²¹		
2010		AFF first came to Australia as a student in 1996 and, after obtaining a 457 visa in 1998, obtained permanent residency and then, in 2002, an Australian citizen. He and his family are friends of QKVH's family. He has known QKVH all of his life. Prior to his offending in 2010, QKVH had occasionally borrowed money from AFF but had always paid it back. In 2010, he failed to repay money on two occasions. QKVH's father told him that he had sent \$55,000 to his son for study and there was nothing to show for it. AFF advised QKVH's father that he should be strict with his son and should stop sending him money. QKVH needed to learn to stand on his own two feet. ²²		
(17 January 2011)			Drive Whilst Authorisation Suspended (2 Charges).	On each charge: Imprisonment 2 months concurrent wholly suspended for 12 months. Licence suspended for 2 months.

¹⁸ Exhibit 2, volume 1 at 393

¹⁹ Exhibit 1

²⁰ Exhibit 2, volume 1 at 395

²¹ Exhibit 2, volume 1 at 397

²² Exhibit I at [1]-[12]

15 April 2011	Student (Temporary) (Class TU) visa cancelled.	QKVH said that he did not receive notification that his visa had been cancelled and attributed that to his being homeless at the time. He accepts that he should have notified the Department of Home Affairs (Department).	Drive Without L Plate Displayed. Learner Driver Drive Without Experienced Driver. Enter intersection – red traffic light. Use unregistered motor vehicle (2 charges). (Frankston Magistrates Court)	Both charges struck out.
13 dates between 31 May and 28 June 2011		QKVH used credit card details that he said that he had found in a motel room to purchase goods from seven stores with six of the incidents taking place at stores belonging to one supermarket chain. The purchases ranged between \$15.50 from a supermarket to \$390 from an optometrist. The total value of the goods purchased was \$1,984.45.	Obtain Property By Deception (13 Charges).	Fined \$500 as part of an aggregate order. Charges heard on 17 August 2011.
(25 July 2011)			Theft from Shop Fail to Answer Bail (Melbourne Magistrates Court)	On all charges: Without conviction. Community Based Order for 9 months to perform 75 hours.
4 August 2011		QKVH was arrested and held on remand until sentenced on 17 August 2011. At this time, QKVH discovered that he did not hold a visa and was in Australia unlawfully.		
2011		At some time during 2011, AFF visited QKVH in detention. AFF was accompanied by his own father and he was very upset about where QKVH was going in his life.		
(17 August 2011)			Obtain Property By Deception (13 Charges).	On all charges: Imprisonment 1 month concurrent.
			Breach of Suspended Sentence Imposed on 17 January 2011 (2 Charges). (Melbourne Magistrates Court)	Breach Proven. On both charges: Suspended sentence wholly restored. The restored term is 2 months imprisonment.
			Recklessly Cause Injury. (Melbourne Magistrates Court)	Imprisonment 3 months concurrent.
20 September 2011			Variation of Community Based Order Imposed on 25 July 2011. (Frankston Magistrates Court)	Order varied. Without conviction. Community Based Order for 9 months to perform 75 hours to commence on 25 October 2011.
25 October 2011		QKVH was released from prison and immediately taken		

		to immigration detention as he did not hold a valid visa. During immigration detention, he was prescribed medication for treatment of depression, anxiety and post-traumatic stress disorder (PTSD).		
25 October to 17 November 2011		QKVH attempted to lodge an application for a Subclass 820/821 Partner Visa sponsored by Valentina but they could not afford the application fee of \$2,960.		
28 November 2011		QKVH applied for a Bridging Visa E (Subclass 050).		
30 November 2011		Application for Bridging Visa E (Subclass 050) refused. QKVH remained in immigration detention.		
13 December 2011		Decision affirmed by former Migration Review Tribunal but it referred the matter to the Minister for his consideration for personal intervention on the basis that QKVH met the requirements for a Partner Visa. ²³		
16 December 2011		New Pakistani passport issued to QKVH for a 12 month period. ²⁴		
9 January 2012		QKVH lodged an application for a Bridging Visa E (Subclass 050) on the basis he lodge a Partner Visa and was granted the bridging visa on the basis he lodged that application by 20 January 2012.		
20 January 2012		QKVH lodged combined application for Partner (Temporary) (Class UK) and Partner (Residence) (Class BS) visa.		
20 January 2012		Bridging Visa) E (Subclass 050) granted on condition that he did not work.		
30 January 2012	Granted Bridging Visa E (Subclass 050) subject to conditions 8101, ²⁵ 8401, ²⁶ 8506 ²⁷ and 8207. ²⁸	No right to work.		
2 March 2012	QKVH applied for removal of condition 8101 so that he could work.	QKVH wrote that he was suffering from financial hardship because his account in Pakistan had been made inactive while he was in detention Australia. He had to return to Pakistan before he could activate it. His expenses were \$600 per week and his income Nil. In his application, QKVH wrote that he was suffering from anxiety and Post Traumatic Stress Disorder. Keeping busy through work was part of his treatment and recovery process.		
7 March 2012	Granted Bridging Visa E (Subclass 050). Change in conditions declined.	A delegate of the Minister declined QKVH's request because he had not identified his expenses so that they could not be assessed as reasonable or otherwise. In addition, he had stated that his partner had been supporting him and that, if he could not work, that his partner and his parents would support him. There was no evidence that they had ceased to do. In summary, the delegate decided that QKVH did not have a		

²³ Exhibit 2, volume 2 at 538-541

²⁴ Exhibit C

²⁵ "The holder must not engage in work in Australia." Migration Regulations; r 1.03 defining "condition" and Schedule 8.

²⁶ "The holder must report: (a) at a time or times; and (b) at a place; specified by the Minister for the purpose." Migration Regulations; r 1.03 defining "condition" and Schedule 8.

²⁷ "The holder must notify Immigration at least 2 working days in advance of any change in the holder's address." Migration Regulations; r 1.03 defining "condition" and Schedule 8.

²⁸ "The holder must not engage in work in Australia." Migration Regulations; r 1.03 defining "condition" and Schedule 8.

		compelling need to work as he or she was satisfied that his reasonable expenses did not exceed his ability to pay for them.		
31 March 2012		QKVH entered a tenancy agreement to lease a room at the rate of \$760 per month payable in advance. ²⁹ A further amount of \$760 was payable as a bond by 2 April 2012. QKVH's father paid the bond. ³⁰		
13 April 2012	QKVH applied for removal of condition 8101 so that he could work.	QKVH wrote that his partner had supported them both and would continue to do so but that they needed more money to support themselves and to pay their expenses. QKVH wrote that he was suffering from extreme financial hardship and referred to attached documents. They do not seem to be in the documents I have been given.		
Undated		A delegate of the Minister declined QKVH's request as he had not disclosed his partner's financial records to substantiate his claim of zero income. In addition, QKVH had not given any documentary evidence that he could not gain access to his bank account in Pakistan. His bank statements showed Netbank transfers from a third party indicating that he may have other means of financial support. The support of his partner and the possibility of another source of support were, in the delegate's mind, sufficient to find that QKVH does not require financial support.		
17 May 2012		QKVH stole sheets and food from a supermarket.	Charged with Shop Theft.	Charges heard on 17 October 2013.
23 May 2012		QKVH sent an email to Opening Doors at the Salvation Army enquiring whether it had sent a cheque for \$760 to the land agents for his rent as they had assured him they would do. He told them that he have received another voice mail from the agents asking for the rent. Opening Doors replied that it would assist with funding his rent arrears when it received an invoice from the agent. ³¹		
7 June 2012		The agent for the lessor of the flat gave QKVH a Notice to Vacate the premises for non-payment of the rent.		
2 July 2012		The landlord applied for possession, rent and bond under the <i>Residential Tenancies Act 1997</i> (Vic). Orders made directing payment of a month's rent (paid by Homeground) and that weekly rent be paid at the rate of \$200 until the rent owed was fully paid one month in advance. ³²		
12 July 2012	Application to change visa conditions on Bridging Visa) E (Subclass 050)	In support of his application to be permitted to work, QKVH said that it was difficult for him to provide stability and security for his partner and particularly so given her inability to work. He needed to be able to pay rent, food, transport, phone and other utility bills and could not do so without the right to work and a job. In the past, his parents had supported him financially but they were not longer able to do so as they had to provide for his siblings. They had to borrow to pay for his studies and their financial commitments are now too onerous. QKVH estimated his income as Nil and his expenses as \$227.50. ³³		
12 August 2012	Application to change visa conditions on Bridging Visa) E (Subclass 050) to permit work	Condition 8101 remained in place with the consequence that QKVH did not have a right to work. Bridging Visa E (Subclass 050) continued to be subject to conditions 8101, ³⁴ 8401, ³⁵ 8506 ³⁶ and 8207. ³⁷		

²⁹ Exhibit 2, volume 1 at 389

³⁰ Exhibit A at [67]

³¹ Exhibit 2, volume 1 at 384

³² Exhibit 2, volume 2 at 410

³³ QKVH supported his statement with a Statutory Declaration dated 10 July 2012: Exhibit 2 at 418-419

20 August 2012	Granted Bridging Visa E (Subclass 050) subject to conditions 8101, ³⁸ 8401, ³⁹ 8506 ⁴⁰ and 8207. ⁴¹	Condition 8101 remained in place with the consequence that QKVH did not have a right to work.		
14 September 2012		QKVH obtained a prescription for the medication that he had been prescribed while in detention. He stole medication from a pharmacy after he was told that he was not eligible to receive medication under Medicare. ⁴²	Charged with Shop Theft.	Charges heard on 17 October 2013.
20 November 2012	Application to change conditions to permit work refused.			
22 January 2013		QKVH stole drinks from a supermarket and threatened the supermarket's security officer with a pocket knife.	Charged with Shop Theft, Threat to Inflict Serious Injury and Assault with a Weapon.	Charges heard on 17 October 2013.
2 May 2013		QKVH was permitted to stay at Hanover Housing from 2 to 29 May 2013. He was not permitted to stay beyond that time as he could not pay rent. ⁴³		
31 March 2013		QKVH collapsed in a state of unconsciousness after smoking synthetic marijuana after being offered a bong by a neighbour. Although he had occasionally smoked marijuana, this was the first time he had tried synthetic marijuana. ⁴⁴		
16 May 2013	Granted a Bridging Visa E (Subclass 050) subject to conditions 8506, ⁴⁵ 8207, ⁴⁶ 8401. ⁴⁷	Condition 8101 no longer imposed and QKVH had a right to work in Australia.		

³⁴“The holder must not engage in work in Australia.” Migration Regulations; r 1.03 defining “condition” and Schedule 8.

³⁵“The holder must report: (a) at a time or times; and (b) at a place; specified by the Minister for the purpose.” Migration Regulations; r 1.03 defining “condition” and Schedule 8.

³⁶“The holder must notify Immigration at least 2 working days in advance of any change in the holder’s address.” Migration Regulations; r 1.03 defining “condition” and Schedule 8.

³⁷“The holder must not engage in work in Australia.” Migration Regulations; r 1.03 defining “condition” and Schedule 8.

³⁸“The holder must not engage in work in Australia.” Migration Regulations; r 1.03 defining “condition” and Schedule 8.

³⁹“The holder must report: (a) at a time or times; and (b) at a place; specified by the Minister for the purpose.” Migration Regulations; r 1.03 defining “condition” and Schedule 8.

⁴⁰“The holder must notify Immigration at least 2 working days in advance of any change in the holder’s address.” Migration Regulations; r 1.03 defining “condition” and Schedule 8.

⁴¹“The holder must not engage in work in Australia.” Migration Regulations; r 1.03 defining “condition” and Schedule 8.

⁴² Exhibit B at [28]

⁴³ Exhibit 2, volume 2 at 521

⁴⁴ Exhibit 2, volume 2 at 505

⁴⁵“The holder must notify Immigration at least 2 working days in advance of any change in the holder’s address.” Migration Regulations; r 1.03 defining “condition” and Schedule 8.

(17 October 2013)			Contravene Community Based Order. Theft from Shop. Shop Theft. Threat to Inflict Serious Injury. Theft. Assault with Weapon. (Werribee Magistrates Court)	Proven. No further penalty imposed. On all charges: Convicted. Community Correction Order for 12 months. Convicted. Community Correction Order for 12 months. QKVH was required to undergo a mental health assessment and undergo treatment as directed. ⁴⁸
2013		At some time during 2013, QKVH's father visited Australia and stayed with his son. AFF saw both of them together and QKVH told him about his being charged with assault with a weapon. While QKVH had been very upset when he visited him in the Remand Centre but the fact that his father visited him made a big change in him, AFF said. He was a changed man after his father's visit. He was remorseful Whereas he was not willing to have QKVH in his house in 2011, AFF invited QKVH to stay with him in his house in 2013.		
6 November 2013	Decision reviewed by Migration Review Tribunal	The Migration Review Tribunal remitted the application for a Partner (Temporary) (Class UK) visa with a direction that QKVH met the relevant criteria as they were in a spousal relationship. ⁴⁹		
24 February 2014 ⁵⁰		Employed by a financial mercantile agency with a credit provider licence (Agency). The Agency buys debts from various financial institutions and seeks to recover those debts. QKVH was employed as an Account Representative. He is required to contact the debtors to work out a repayment plan that takes account of financial hardship claims and is also required to refer matters for the commencement of debt recovery proceedings in the courts and bankruptcy proceedings as well as various administrative duties.		
2014		QKVH reported " <i>working condition problems</i> " to his medical practitioner. ⁵¹		
2 March 2015		Mr Michael Hodgman, psychologist, reported that QKVH had suffered racial taunts at a railway station and then a series of racial vilifications from his work employers. Victorian WorkCover accepted his claim for compensation. ⁵²		
July 2016		Returned to work at the Agency. ⁵³		
4 October 2016	Bridging Visa E (Subclass 050) cancelled.	QKVH's application for a partner visa refused and his Bridging Visa E (Subclass 050) cancelled as a consequence. He was placed in immigration detention		

⁴⁶"The holder must not engage in any studies or training in Australia." Migration Regulations; r 1.03 defining "condition" and Schedule 8.

⁴⁷"The holder must report: (a) at a time or times; and (b) at a place; specified by the Minister for the purpose." Migration Regulations; r 1.03 defining "condition" and Schedule 8.

⁴⁸ Exhibit 2, volume 2 at 750

⁴⁹ Exhibit 2, supplementary volume at 78-85

⁵⁰ Exhibit 2, volume 2 at 567

⁵¹ Exhibit 2, supplementary volume 2 at 73

⁵² Exhibit 2, supplementary volume at 77

⁵³ Exhibit B at [42]

		at the Maribyrnong Immigration Detention Centre (MIDC).		
25 October 2016	Application for Partner Visa lodged on 20 January 2012 refused.	A delegate of the Minister was not satisfied that QKVH and Valentina provide each other with companionship and emotional support or that they have a joint commitment to a shared life. She was not satisfied that they had a genuine and continuing relationship and not defacto partners within the meaning of s 5CB of the Migration Act. ⁵⁴		
December 2016		The MIDC acknowledged QKVH's contribution to its Programmes and Activities when he gave lessons on Debt Management between 7 and 28 December 2016. Each lesson covered a different aspect of debt management. ⁵⁵		

DOES QKVH PASS THE CHARACTER TEST?

10. The Minister has relied on s 501(6)(d)(i) of the Migration Act. That is only one of the grounds in s 501(6)(d) and his Direction No. 65 deals with both by making the general statement in cl 6 of Annex A to Direction No. 65 that:

- “(2) *The grounds are enlivened if there is evidence suggesting that there is more than a minimal or remote chance that the person, if allowed to enter or to remain in Australia, would engage in conduct specified in section 501(6)(d) of the Act.*
- (3) *It is not sufficient to find that the person has engaged in conduct specified in paragraph 501(6)(d) of the Act in the past. There must be risk that the person would engage in the future in the specified conduct set out in section 501(6)(d)*”⁵⁶

After repeating the effect of s 501(6)(d)(i) of the Migration Act at cl 6.1(1) of Annex A, the Minister goes on to make the observation that:

*“The reference to criminal conduct must be read as requiring that there is a risk of the person engaging in conduct for which a criminal conviction could be recorded.”*⁵⁷

11. What is meant by the words “*risk of the person engaging in conduct for which a criminal conviction could be recorded*”? I note the general view that:

⁵⁴ Exhibit 2, volume 2 at 796

⁵⁵ Exhibit C at 9

⁵⁶ Direction No. 65 at 6.1(2)

⁵⁷ A person cannot be convicted of an offence merely because he or she is in Australia as an unlawful non-citizen. Therefore, I respectfully disagree with the statement made at [51] of *Re CBYQ and Minister for Immigration and Border Protection* [2018] AATA 91 by Deputy President Constance that “...The Minister argued that the Applicant’s residence as an unlawful non-citizen should be regarded as criminal conduct. This was appropriate. ...”

“... Interpreting a composite phrase by dissecting it into its component words and seeking a meaning for each has, however, long been identified as an inappropriate method of construing such a phrase ...”⁵⁸

I am not concerned with a phrase as such but I will bear that in mind as I look first to the meaning of “*criminal conduct*”. Consistently with the statement in cl 6.1(2) of annex A of the Ministerial Direction, the reference to “*criminal conduct*” in s 501(d) (i) is not limited to conduct which has led to a criminal conviction. It extends to conduct “... *for which a criminal conviction could be recorded* ...”. As the Full Court of the Federal Court said in *Minister for Immigration v Baker* after considering the various references in the Migration Act to “*criminal convictions*” and to “*past criminal conduct*” and the like, the reference to “*criminal conduct*”:

“... is not concerned with whether the conduct has had some temporal result, such as the incurring of a conviction, but with the light that the conduct throws on the actor’s character. Of course, in the absence of a prosecution and conviction, satisfaction that criminal conduct has occurred will not be attained on slight material: see the interesting note by B Robertson, ‘Criminal Allegations in Civil Cases’ (1991) 107 LQR 194.”⁵⁹

12. In other words, it may be that the conduct led to a court’s finding the conduct proved when a person was charged with an offence but doing so without conviction. That conduct would be “*criminal conduct*”. It may be that the person has engaged in conduct, for which he or she could have been charged with an offence and, if the charge were proved, convicted of a criminal offence but never was. If the Tribunal is satisfied that this conduct occurred, that conduct could be regarded as “*criminal conduct*”.⁶⁰ Overstaying a visa and so being in Australia as an unlawful non-citizen is not of itself criminal conduct for there is no criminal offence of that type. There are consequences, of course, such as detention and removal from the country but they are not consequences that might lead to a conviction for a criminal offence.

⁵⁸ *Secretary, Department of Social Security v Ekis* (1998) 85 FCR 382; 52 ALD 246; 28 AAR 36 at 385; 249; 39 per Drummond J

⁵⁹ (1997) 73 FCR 187; 153 ALR 463; 45 ALD 136; 24 AAR 457 at 194; 469; 141; 463; Burchett, Branson and Tamberlin JJ

⁶⁰ In such a situation, the Tribunal would be obliged to advise an applicant that he or she has the right to refuse to answer any questions on the basis that the answer might incriminate him or her. It may not draw an adverse conclusion by virtue of the fact that a person declines to answer a question on that basis: *Dolan and Australian and Overseas Telecommunications Corporation* [1993] FCA 202; (1993) 42 FCR 206; 31 ALD 510 at [58]; 215; 520 per Spender J. If an applicant chose that course, the Tribunal may proceed to make a finding regarding the nature of the conduct, including whether it was criminal, on the basis of other available material and for the purpose of reviewing, and making, an administrative decision.

13. The word “*risk*” is not defined but its ordinary meanings when used as a noun, as it is in s 501(6)(d)(i), include the following which is relevant:

“... **1** *the chance or possibility of suffering loss, injury, damage, etc; ...*”.⁶¹

Therefore, having regard only to the ordinary meaning of the word “*risk*”, the issue under s 501(6)(d)(i) becomes whether there is a chance or possibility of QKVH’s engaging in criminal conduct in Australia. The word “*risk*” must, however, be interpreted in its context and that is the context of the Migration Act and so in the context of who may, and may not, come to and/or remain in Australia. In that context, the word “*risk*” cannot be seen to mean simply a “*chance or possibility*” of a person’s engaging in criminal conduct in Australia for to do so would not take account of the realities of everyday life. Take, for example, members of the Australian community who drive a motor vehicle. Even if they have never done so before, there is a chance or possibility that any one of them may have a lapse in concentration or judgment and commit an offence against the road laws of a type for which a conviction may be imposed. That chance or possibility will, of course, be greater if the person has a history of traffic offences so that the risk of his or her doing so increases. Section 501(6)(d)(i) is not directed to the risk that a person will engage in criminal conduct if allowed to remain in Australia at what might be thought to be a theoretical level. It is directed to an assessment of risk at a level which is, as Direction No. 65 says, “... *is more than a minimal or remote chance* ...” of engaging in conduct which is, in this instance, criminal conduct. It cannot be set at a greater level than that for the word “*risk*” is not qualified by any adjective such as “*significant*”, “*substantial*”, “*real*”, any of which might have done so.

14. There is no question that QKVH has engaged in criminal conduct in the past but I am required to assess the risk of his doing so if permitted to remain in Australia in the future. His past conduct does, however, inform the future as do his actions and behaviour since his last offending. QKVH gave evidence as to his falling in love with Valentina almost as soon as he met her. His evidence that it became clear to him early in the relationship that she suffered from mental health issues and some medical conditions was not contested. Nor was his evidence as to her frequent and sometimes lengthy periods of hospitalisation. I accept that he became committed to Valentina and to her care. His priority was to care for her

⁶¹Chambers 21st Century Dictionary, 1999, reprinted 2004

and, in doing so, he seemed to lose all sense of responsibility to himself for his own care and for his responsibilities to Australia, where he was permitted to remain while he studied, or to his father and his family, who provided him with money to live until sometime in or about 2010. At this time, QKVH had the means to earn some income himself as he was entitled to undertake some work on his student visa. He did not take advantage of that as he put his need to be available to meet Valentina's needs first.

15. In the offences in which QKVH was involved were directed, on the whole, to obtaining food, drink and medication for himself and some presents for Valentina to make her happy. Some he obtained simply by shoplifting. Those he obtained by use of credit card numbers that he said that he found in a room in which he was staying. I find that he used those credit card numbers to order goods online and, apart from the goods he stole from David Jones, those purchases represented a significant amount of money compared with his thefts, which were directed to food and drink.
16. Three other offences should also be mentioned. They are those occurring on 29 January 2010 (Possess Controlled Weapon Without Excuse and heard on 25 July 2011), 22 August 2010 (Recklessly Cause Injury heard on 17 August 2011) and 22 January 2013 (Threat to Inflict Serious Injury and Assault with a Weapon and heard on 17 October 2013). The first conviction came about, QKVH said, because he had a knife in his backpack to cut food because he was homeless. He has explained that the second incident occurred when he and Valentina went to the cinema to celebrate the anniversary of their meeting. Valentina was laughing too loudly and others at the cinema took offence. When a group of people surrounded Valentina at the end of the film and impeded her path and started to push and hit her, QKVH said that he intervened to protect her. The upshot was that one of the group of people was injured and he and Valentina were charged with offences. On the third occasion, QKVH acknowledged that he had pulled out a pocket knife and threatened the supermarket's security officer with it. He said that he panicked.
17. While I accept each of the explanations, I cannot go behind the offences to find that the convictions should not stand or that the elements of the offences for which

QKVH was convicted were not properly made out.⁶² I can, though, look at other matters that relate to the commission of the offence if they do not upset the elements of the offence on which the conviction was based. This was explained by Davies J in *Re Beckner and Minister for Immigration, Local Government and Ethnic Affairs*⁶³ when he pointed out the different functions of the sentencing judge and the Tribunal:

“ *The Administrative Appeals Tribunal, when it is reviewing a decision to deport, is not bound by or limited to all the findings of fact made by a sentencing judge in the course of giving his reasons for sentence. The function of sentencing a person convicted of a crime is a different function from that of deciding whether or not the convicted person should be deported. Matters which may be of great significance to a decision to deport, because for example, they go to the risk of recidivism, may be of little significance to a sentencing judge. In the present case, for example, where a long term of imprisonment was imposed because of the nature and seriousness of the crime, it was not necessary for the sentencing judge to determine whether Mr Beckner’s crime was an isolated event or formed part of a pattern of drug-related activity on his part. From the point of view of deportation, however, such a matter was important. ...*⁶⁴

18. The offences occurred and they are an integral part of the choices that QKVH made in the approximately three year period between 2010 and 2013. The choices he made led to his not taking advantage of his right to work in Australia to supplement the money he was given by his father, to his not studying as required by the conditions of the visa permitting him to remain in Australia, to his not telling his family or the family friend of his circumstances and to his committing crimes in order to survive. On his evidence, which I accept, he made those choices so that he could be with Valentina. She is ill and he did not want to abandon her. He loves her.
19. QKVH’s choices led to his missing lectures because he wanted to spend time with Valentina and, finally, to his missing them altogether. Although he had been given permission to work on 10 July 2007 and started working, he lost various jobs after he met Valentina in August 2008. He did so because Valentina would often call him during work with an emergency. QKVH would then leave his work to be with

⁶² *Minister for Immigration and Multicultural Affairs v Ali* [2000] FCA 1385; (2000) 106 FCR 313 at 325-326; [41]-[45] per Branson J

⁶³ [1991] FCA 264; (1991) 30 FCR 49

⁶⁴ [1991] FCA 264; (1991) 30 FCR 49 at [7]; 50-51

her. Eventually, his bosses would get fed up with this and he would lose his job.⁶⁵ The loss of his jobs meant the loss of income. In January 2010, he was first apprehended and charged with offences. The charges laid when he was apprehended on the first and second occasions in January 2010 related to the use of his motor vehicle, which was unregistered, and his driving whilst authorisation was suspended. That same month, January 2010, he was apprehended for stealing from David Jones.

20. During 2010, he was evicted from his rental property and started to couch surf. He stayed with AH for three or four months when he put two armchairs together to sleep on. At times, QKVH lived with Valentina's father and grandmother in her grandmother's house. They stayed there until Valentina and her father had an argument and he told QKVH and his daughter to leave. For some months, they also lived with Valentina's mother. At times, QKVH would sleep in his car. Valentina would sleep with him in the car at times. After his car was seized, he slept rough at times.
21. QKVH's dedication to Valentina and her needs is very noble and honourable but the consequence was that QKVH was without income and became homeless. I accept that it followed that his lack of income and homelessness led to his committing offences. Those offences involving the theft of food can be regarded as directly related. Those involving the theft of other items such as the necklace are put in the context of his wanting to have a gift for Valentina are understandable in the context. They remain offences although I accept that they came about because of his lack of income and his homelessness. Even his drawing his pocket knife can be attributed to a degree of desperation. The incident at the cinema is more attributable to poor judgment and self-control in the situation. He has not committed further offences when he was permitted to work again and was no longer homeless.
22. Homelessness may be a state in which a person finds him or herself through circumstances over which he or she has had no, or very little, control. QKVH was not a person in that position. He met the love of his life and the love of his life needed a great deal of care. QKVH met her at a time when he had obligations to meet as a result of the conditions on the visa that permitted him to come to, and

⁶⁵ Exhibit A at [11] and [35]

remain in, Australia for the duration of his studies. QKVH made choices as to where his priorities lay. He appears to have given no thought to being able to balance Valentina's needs and his obligations to his employers or to those imposed under his visa. Does it mean that, if hard times come again, will he repeat his actions so that he steals to support himself? The evidence of Mr Warren Simmons, a Consulting Psychologist, does not answer that question. His evidence is that QKVH's behaviour seems to have arisen from a particular set of circumstances and that he appears to be at a low risk of offending. Mr Simmons could not otherwise make a prediction of QKVH's behaviour in the future.

23. In view of all of the evidence, I have come to the view that there is more than a minimal or remote chance that he would engage in the same sort of conduct were he again to form the view that someone or something required his attention above all else and regardless of the consequences to others. Therefore, I find that, in the event the event that QKVH were allowed to enter or to remain in Australia, there is a risk that he would engage in criminal conduct in Australia within the meaning of s 501(6)(d)(i). Therefore QKVH does not pass the character test and I must consider whether I should exercise the discretion to refuse to grant him a Partner (Temporary) (Class UK) visa under s 501(1).

DIRECTION NO. 65 AND REFUSAL OF A VISA

General Guidance and Principles

24. Part B of Direction No. 65 sets out the Minister's directions given under s 499 in relation to visa refusals under s 501(1) of the Migration Act. Before examining that part, I have turned to the Preamble of the Ministerial Direction for it provides the setting in which specific directions given in Parts A, B and C are to be considered.
25. I will begin with cl 6.2(1) for it is a cornerstone of Direction No. 65:
- "The Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. The principles below are of critical importance in furthering that objective, and reflect community values and standards with respect to determining whether the risk of future harm from a non-citizen is unacceptable."*
26. This is followed by a statement of Principles that establish the framework in which the individual considerations set out in Parts A, B and C of Direction No. 65 are

set. They give those considerations their form and pattern and *raison d'être*. The Principles set out in paragraph 6.3 are:

- “(1) *Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia’s law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
- (2) *The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere.*
- (3) *A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against vulnerable members of the community such as minors, the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*
- (4) *In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.*
- (5) *Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.*
- (6) *Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.*
- (7) *The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen’s visa should be cancelled, or their visa application refused.”*

27. Paragraph 7(1) sets out how the discretion under s 501 is to be exercised:

“Informed by the principles in paragraph 6.3 above, a decision-maker:

- a) *must take into account the consideration in Part A or Part B, where relevant, in order to determine whether a non-citizen will forfeit the privilege of being granted, or of continuing to hold, a visa; or*

- b) *must take into account the considerations in Part C, in order to determine whether the mandatory cancellation of a non-citizen's visa will be revoked.*"

28. Considerations that differ slightly from each other are prescribed in each Part. The reason for that difference is explained in paragraph 8(1):

"... Separating the considerations for visa holders and visa applicants recognises that non-citizens holding a substantive visa will generally have an expectation that they will be permitted to remain in Australia for the duration of that visa, whereas a visa applicant should have no expectation that a visa application will be approved."

Part B of Direction No. 65

29. In this case, Part B sets out the considerations that are relevant to the refusal of a visa. Paragraph 8 of Direction No. 65 sets out how the considerations are to be applied by a decision-maker in coming to the relevant decision. Decision-makers must take into account the primary and other considerations relevant to the individual case.⁶⁶
30. In applying the considerations, whether primary or other considerations, a decision-maker must give appropriate weight to information and evidence from independent and authoritative sources.⁶⁷ Paragraph 8(3) provides that *"Both primary and other considerations may weigh in favour of, or against refusal ... of the visa ..."*. Generally, primary considerations should be given greater weight than other considerations and one or more primary considerations may outweigh other primary considerations.⁶⁸
31. When making a decision whether to refuse an application for a visa, Part B of Direction No. 65 requires, in summary, regard to be had to the following three primary considerations:
- a) *Protection of the Australian community from criminal or other serious conduct;*
 - b) *The best interests of minor children in Australia;*
 - c) *Expectations of the Australian community.*⁶⁹

⁶⁶ Direction No. 65 at [8(1)]

⁶⁷ Direction No. 65 at [8(2)]

⁶⁸ Direction No. 65 at [8(4)] and [8(5)]

⁶⁹ Direction No. 65 at [11(1)]

The other criteria:

“... include (but are not limited to):

- a) *International non-refoulment obligations;*
- b) *Impact on family members;*
- c) *Impact on victims;*
- d) *Impact on Australian business interests.”*

32. Direction No. 65 expands upon each of these criteria and I return to it when considering each of them in these reasons. For the moment, I will merely note that, consistent with the reasoning of North J in *Williams v Minister for Immigration and Citizenship*⁷⁰ (*Williams*), the question that I must ask myself when I have had regard both to the primary and other criteria is whether, in the case of an application for a visa, a decision should be made to grant or refuse that visa. That question will be answered in light of the assessment of the primary and other considerations but also taking into consideration all matters that are relevant having regard to the subject matter of the Migration Act, its object and its underlying policy. The task is much more than simply placing the assessments of the primary and other considerations into the balance to determine the answer to the question.⁷¹ I will now consider the evidence in light of the considerations in Part B.

CONSIDERATION

Primary considerations

33. Part B begins with three considerations that are characterised as primary considerations: protection of the Australian community from criminal or other serious conduct; the best interests of minor children in Australia; and the expectations of the Australian community. Each of these considerations is developed in the remainder of paragraph 11.

A. Protection of the Australian community

34. The first primary consideration relating to the protection of the Australian community begins with the general statement:

⁷⁰ [2013] FCA 702; (2013) 136 ALD 299 at [42]-[44]; 311

⁷¹ I have expanded on the reasoning on this issue in *Re Maikantis and Minister for Immigration and Border Protection* [2018] AATA 40 at [16]-[22]

“When considering protection of the Australian community, decision-makers should have regard to the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. There is a low tolerance for visa applicants who have previously engaged in criminal or other serious conduct. Decision-makers should also give consideration to:

- a) The nature and seriousness of the non-citizen’s conduct to date; and*
- b) The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.”⁷²*

A.1 The nature and seriousness of QKVH’s conduct to date

35. Paragraph 11.1.1 goes on to expand on the nature and seriousness of the non-citizen’s offending or other conduct to date. It sets out a number of factors to which a decision-maker must have regard in considering this matter. In the circumstances of this case, the following factors may be relevant:

- “a) The principle that, without limiting the range of offences that may be considered serious, violent and/or sexual crimes are viewed seriously;*
- b) The principle that crimes committed against vulnerable members of the community (such as minors, the elderly and the disabled) ... are serious;*
- c) ...*
- d) The principle that any conduct that forms the basis for a finding that a non-citizen does not pass a subjective limb of the character test is or is not of good character under section 501(6)(c), is considered to be serious [sic];*
- e) The sentence imposed by the courts for a crime or crimes;*
- f) The frequency of the non-citizen’s offending and whether there is any trend of increasing seriousness;*
- g) The cumulative effect of repeated offending;*
- h) Whether the non-citizen has provided false or misleading information to the department, including by not disclosing prior criminal offending;*
- i) ...”*

A.1.1 Consideration

36. I have considered some of the relevant material in deciding whether or not QKVH passes the character test. His history of offending shows that he was convicted for offences that occurred in a two year period between 6 January 2010 and 22

⁷² Direction No. 65; [11.1(1)]

January 2013. It is true that the period coincided with a period when he either had no income from paid work or, in the later stage, was not entitled to work. Although I can understand that he and Valentina were mutually captivated by each other, his not working when he could have was as a result of his choice. It was a choice to support her and to spend his time with her rather than to study and to work to supplement or to earn money to support himself.

37. His offences in this period might be considered to be on the lower scale of offending but they do show a pattern. He has explained his initial driving offences in January 2010 on the basis that he did not understand that his obtaining a Victorian Learner's Permit would supersede his Pakistani Driver's Licence and that he could not lawfully drive his motor vehicle. By the time that he was apprehended for his first driving offence, he had been in Australia over three years and I can only presume that he had been driving with that understanding for all of that period. By then, he had known Valentina for almost eighteen months and his money issues had become so pressing that he could not register his car. While his failing to make himself aware of local law and driving an unregistered motor vehicle are of concern, of greater concern is QKVH's evidence that he continued to drive his car to find new locations in which he could sleep and to take Valentina to and from her hospital appointments. He was apprehended just over a week later for driving offences and all of offences were heard together a year later on 17 January 2011. Even though the term of imprisonment was suspended, the imposition of a term of imprisonment at all for first offences suggests that the sentencing magistrate took a grave view of the set of offences that took place over the two week period.
38. Even though he had been apprehended for driving offences earlier in January 2010, QKVH shoplifted a number of items from David Jones later in the month. He was not convicted of those offences although required to complete a Community Based Order when the matter came to court on 25 July 2011. In the couple of months before that, QKVH had used credit card details to obtain property by deception. Not only had he committed 13 offences by doing so, he had breached the terms on which his earlier two month term of imprisonment had been suspended. That sentence was wholly restored and a further term was added for the incident at the cinema. QKVH explained that he was defending his girlfriend but I am bound to have regard to the fact that he was convicted of Recklessly

Causing Injury. In the course of these events, QKVH also failed to answer bail. The final sets of offences are theft related but they show an escalation when, on 22 January 2013, QKVH drew a pocket knife against the supermarket's security officer. He did not cause any injury with it and said that he drew it because he panicked. Accepting that, his drawing a pocket knife at all indicates very poor judgment and lack of concern for others.

A.2 Risk to the Australian community should the non-citizen commit further offences or engage in serious conduct

39. Paragraph 11.1.2 of Direction No. 65 states:

- “(1) In considering whether the non-citizen represents an unacceptable risk of harm to individuals, groups or institutions in the Australian community, decision-makers should have regard to the principle that the Australian community’s tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.*
- (2) In addition, decision-makers should have regard to the principle that Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.*
- (3) In considering the risk to the Australian community, decision-makers must have regard to, cumulatively:*
 - a) The nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and*
 - b) The likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:*
 - i. information and evidence on the risk of the non-citizen reoffending; and*
 - ii. evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken); and*
 - iii. the duration of the intended stay in Australia.*
- (4) Decision-makers should consider the risk of harm in the context of the purpose of the intended stay, and the type of visa being applied for, including whether there are strong or compassionate reasons for granting a short stay visa.”*

A.2.1 Consideration

40. QKVH has not reoffended since he was granted a Bridging Visa E with working rights on 16 May 2013. He found stable employment and stable accommodation and that situation continued until 4 October 2016. During that time, he was away for what seems to be a significant period of time on worker's compensation. He would have received income during that time and maintained his record of not committing further offences. On the basis of his evidence, I find that his relationship with Valentina continued. If I have regard only to a situation in which QKVH is able to work and has accommodation and the funds to pay for his medication when he needs it and Valentina's need for his time can be managed because her needs are met by health professionals during her hospitalisation or by her psychiatrist, I find that the risk of his reoffending is small.
41. What concerns me, however, is if the situation in which QKVH finds himself is not that which I have posited. His past homelessness and offending and their pattern lead me to conclude that there remains risk that he will make unwise judgments and revert to offending if his situation were to change. He continued to make those unwise choices after he was granted a Bridging Visa E without working rights. As hard as that was, he had at least one choice open to him other than to commit further offences although I recognise that the choice took the form of his returning to Pakistan and leaving Valentina if only in the short term.

B. Best interests of minor children in Australia affected by the decision

42. QKVH does not have any children and no evidence has been given regarding any other minor children in Australia whose interests are relevant in this case. Therefore, I will not give this aspect of Part B of Direction No. 65 any further consideration.

C. Expectations of the Australian community

43. Paragraph 11.3(1) of the Direction states that:

"The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to refuse the visa application of such a person. Visa refusal

may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted a visa. Decision-makers should have due regard to the Government's views in this respect."

C.1 Consideration: general principles

44. In *YNQY and Minister for Immigration and Border Protection*⁷³ (YNQY), Mortimer J said:

"In substance this consideration is adverse to any applicant. As the Minister submits it is inextricably linked to the other primary consideration of protection of the Australian community. In particular, the last two sentences of para 13.3 of the Direction suggest the 'expectations' about which it speaks are expectations adverse to the position of any applicant who has failed the character test and been convicted of serious crimes. In this primary consideration as expressed (and despite the references earlier in the Direction to 'tolerance') the Australian community's 'expectations' are defined only in one particular way: namely, that the Australian community 'expects' non-revocation where a person has been convicted of serious crimes of a certain nature. That is, this is not a consideration dealing with any objective, or ascertainable expectations of the Australian community. It is a kind of deeming provision by the Minister about how he or she, and the executive government of which he or she is member, wish to articulate community expectations, whether or not there is any objective basis for that belief. That is the structure of this part of the Direction.

*I do not consider that even if the applicant is correct to submit that the Tribunal did not undertake the task required of it by the Direction in relation to this consideration, he was deprived of a different outcome because of that failure. It was inevitable that this consideration would weigh against revocation: that is what it is intended to do (see Uelese [2016] FCA 348; 248 FCR 296 at [64]- [66])."*⁷⁴

45. The case of *Uelese*, to which her Honour referred, is the case of *Uelese v Minister for Immigration and Border Protection*⁷⁵ (*Uelese*), in which Robertson J had said:

"In my opinion, the reference by the Tribunal to what the Australian community expected of the Australian Government was not a matter that required evidence but was a statement of the views or policy of the Government. The language in paragraph 6.3(2) of the Direction, that the Australian community expects that the Australian Government can and should cancel the visas of non-citizens if they commit serious crimes in Australia, is found in a list of seven 'Principles'. There is a further reference to the expectations of the Australian community in paragraph 9.3 of the Direction where the statement is made that the Australian community expects non-citizens to obey Australian laws while in Australia. It states

⁷³ [2017] FCA 1466; Mortimer J

⁷⁴ [2017] FCA 1466 at [76]-[77]

⁷⁵ [2016] FCA 348; (2016) 248 FCR 296; Robertson J

that where a non-citizen has breached, or where there is an unacceptable risk that they will breach, this trust or where the non-citizen has been convicted of offences in Australia, it may be appropriate to cancel the visa held by such a person. Visa cancellation may be appropriate, the paragraph states, 'simply because the nature of the character concerns or offences were such that the Australian community would expect that the person should not continue to hold a visa'. The paragraph ends by stating that decision-makers should have due regard to the Government's views in this respect.

*This ground of review does not attack the statements in Direction no. 65. In my opinion it is open to the Minister to make a statement of the Government's views as to the expectation of the Australian community and for the Tribunal to act on that statement."*⁷⁶

46. In considering the passages from *Uelese* and *YNQY*, I am mindful of the principles of both precedent and of statutory interpretation. Direction No. 65 has been found not to be a legislative instrument by Robertson J.⁷⁷ It follows that it is not subject to the *Legislation Act 2003*. Therefore, in the absence of any indication in Direction No. 65 to the contrary, the *Acts Interpretation Act 1901* (AI Act) does not apply and nor do the rules of statutory interpretation. It is, as Robertson J said in *Uelese*, the Minister's statement of the Government's views. To the extent that those views are consistent with the law, which in this case is s 501, s 499 of the Migration Act requires the Tribunal, among others, to comply with Direction No. 65. There is no question about that.
47. The question that arises for consideration is how I should read and apply the passage in *YNQY* in so far as paragraph 11.3 of Direction No. 65 relating to Australia's expectations is concerned. Her Honour was concerned with [13.3] of Direction No. 65 but the substance of the two paragraphs is the same. The only difference is that [13.3] applies when revocation under s 501CA of a cancellation decision made under s 501(3A) is under consideration and [11.3] applies when a decision must be made whether to refuse a visa under s 501(1). In *YNQY*, Mortimer J said that it "... *was inevitable that this consideration would weigh against revocation: that is what it is intended to do ...*".⁷⁸ She cited *Uelese* in support. I have set out the paragraphs she relied on at [45] above.

⁷⁶ [2016] FCA 348; (2016) 248 FCR 296 at [64]-[65]; 309

⁷⁷ [2016] FCA 348; (2016) 248 FCR 296 at [45]-[63]; 305-309

⁷⁸ [2017] FCA 1466 at [77]

48. When I read those paragraphs, it seems to me that Robertson J's statement of the effect of, in his case which involved cancellation of a visa, paragraph 9.3 of Direction No. 65, was not quite so definitive. He certainly underlined the propriety of the Minister's making a statement setting out the Government's views as the expectations of the Australian community. I respectfully suggest that his Honour identified that recognition when he referred to [6.3(2)] where it is stated that:⁷⁹

"The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia."

He then moved to paragraph 9.3 and the Minister's statements about what the Australian community expects. In doing so, he has used the words adopted in paragraph 9.3 and, in particular, has used the word "*may*". The word "*may*" is the word used by the Minister in paragraph 9.3. He has not used a word such as "*must*".

49. The word "*may*" is a word that is consistent with the discretionary nature of the power conferred by s 501(1) to refuse to grant a visa, by s 501(2) to cancel a visa and s 501CA(4) to revoke a cancellation decision made under s 501(3). To assume that the expectations of the Australian community will always be a consideration that will weigh against a visa applicant who has failed to pass the good character test does not, I respectfully suggest, sit comfortably with the discretionary nature of the power given to the Minister. The Minister himself recognises in the Principles set out in paragraph 6.3 of Direction No. 65 that a discretion is involved. He talks in terms of what should generally be expected as in paragraph 6.3(3), of there being some circumstances in which the harm that would follow is so great as to be unacceptable even if there are other countervailing considerations paragraph 6.3(4). These are but two of the seven principles in paragraph 6.3 but each of the seven shows that what may be, and what may not be, acceptable to the Australian community is a matter of balance to be considered in each case.
50. It follows that I respectfully suggest that the statement made by Mortimer J in YNQY that "*It was inevitable that this consideration [being that in [13.3]] would weigh against revocation; that is what it is intended to do ...*" is too broadly stated.

⁷⁹ [2016] FCA 348; (2016) 248 FCR 296 at [64]; 309

It may be that it has that effect in some cases but I respectfully suggest that the way in which it is framed overlooks that paragraph 13.3, and so paragraphs 11.3 and 13.3 are drafted in terms that recognise that a decision-maker has discretion to come to a conclusion about the expectations of the Australian community in a particular case. It requires the decision-maker to have regard to the Government's views but they are views that, as I said, allow regard to be had to the whole of the circumstances.

51. Having come to this view, is it appropriate that I apply paragraph 11.3 in a way that is different from the way in which her Honour viewed paragraph 13.3? Given that the two paragraphs are effectively to the same effect and only their context changes, I cannot distinguish *YNQY* on that basis. Therefore, I cannot conclude that, for that reason, it does not bind me. Although Mortimer J decided that the Tribunal had erred on a different ground unrelated to the application of paragraph 13.3 and allowed the appeal, it cannot be said that she did not consider it and that her reasons for judgment on the point were *obiter dicta*.
52. Even though Direction No. 65 is not a legislative instrument and so not subject to the AI Act or to be interpreted as a piece of legislation, it is something that I am bound to follow by virtue of s 499(2A). Therefore, I think that the concepts that underpin the doctrine of precedent in the context of statutory interpretation, as opposed to identification of the common law, may hold the answer to the question that I posed in the previous paragraph. This was considered by Gummow J in *Brennan v Comcare*:⁸⁰

“61. If Ogden^[81] has any significance for this appeal, it is the statement of their Lordships ([1970] AC at 127):

It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must be beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself.

62. Those remarks apply *a fortiori* where what is involved is the translation of remarks construing one statute to the construction of another. They also point to a significant difference in the tasks of the courts in applying the common law and in construing statutes.

⁸⁰ [1994] FCA 1147; (1994) 50 FCR 555; 122 ALR 615; 19 AAR 542; Burchett, Ryan and Gummow JJ

⁸¹ *Ogden Industries Pty Ltd v Lucas* [1970] AC 113; [1969] 1 All ER 121 at 127; 126 per Lord Upjohn delivering the advice of the Privy Council

63. *The judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law. In the latter class of case, the task is to interpret the legal concepts which find expression in the various language used in the relevant judgments. The frequently repeated caution is against construing the terms of those judgments as if they were the words of a statute. The concern is not with the ascertainment of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding of the concepts to which expression was sought to be given.*

64. *The distinction is usefully expressed in the following passage from Judge Posner's work The Problems of Jurisprudence, 1990, page 248:*

Translation may be imperfect and alter the meaning of the original doctrine; nevertheless many common law doctrines have a stable meaning, though expressed in a variety of different ways. We are not afraid that we would lose the meaning of negligence if we put it in different words from those used by Learned Hand, or William Prosser, or some other authoritative expositor of the concept.

Statutory law differs in that the statutory text - the starting point for decision, and in that respect (but only that respect) corresponding to judicial opinions in common law decision making - is in some important sense not to be revised by the judges, not to be put into their own words. They cannot treat the statute as a stab at formulating a concept. They have first to extract the concept from the statute - that is, interpret the statute. (There is a sense in which common law judges 'interpret' common law, but it is the sense in which 'interpretation' means 'understanding'.)⁸²

53. The relevance of the reference to the common law and the difference in the process of reasoning is illustrated by a passage from the judgment of Windeyer J in *Damjanovic & Sons Pty Ltd v The Commonwealth*⁸³ (*Damjanovic*):

"... Analogy – not in the strict mathematical sense, but in the sense of resemblance of facts – has long had a great place in our system of law. It is at the base of the method of precedent in the common law. ... [R]easoning by analogy is a rather different process in the development of the common law from its use in the interpretation and application of a statute or of the Constitution. Sir Owen Dixon, in an extra-judicial address he delivered in 1933 (reprinted in Jestings Pilate (1965), p. 13), said of the common law that

'it has undergone a continuous growth and expansion accomplished by continual deduction and induction. By deduction, a new application is given to an existing principle; many single instances having been thus produced, in course of time a new or developed principle is discerned in them and expounded. By this process of imperfect induction, the secondary principle is established as part of the doctrine of the common law, and plays its part in turn in the production of still more doctrine'.

This, I would respectfully say, is a wholly apt description of the processes of the common law. It points I think the contrast with expositions of the effect

⁸² [1994] FCA 1147; (1994) 50 FCR 555; 122 ALR 615; 19 AAR 542 at 572-573; 633-634; 559-560

⁸³ [1968] HCA 42; (1968) 117 CLR 390; Barwick CJ, McTiernan, Kitto, Taylor, Menzies and Windeyer JJ

of statutes and codes. The process is then one of deduction and subsumption, rather than of imperfect induction. The words of the enactment provide the major premise. The result is not, or ought not to be, the establishment of any secondary principle embodied in new words, but at most the provision of an illustration of the effect in a new setting of the original principle expressed in the original words."⁸⁴

54. In view of these principles, it seems to me that I should be guided by the words of paragraph 11.3 in the immediate context of Direction No. 65 and in the broader context of s 501(1). When that is done, there can be no inevitable outcome. That said, how are the expectations of the Australian community to be evaluated? This was addressed by the Tribunal in *Re Visa Cancellation Applicant and Minister for Immigration and Citizenship*:⁸⁵

" Relevant community values will not depend on transient or fashionable thinking. They will not be found in the publications of vocal minorities or the fulminations of the media, motivated by short term considerations and the improvement of circulation or ratings. They will not necessarily reflect the views of individual politicians. Community standards will be found in more permanent values. They will be informed in part by legislation of the parliaments, and especially legislation applicable to the decision-making. Formal statements by ministers will be relevant, but not when they are not speaking officially or when their remarks are not carefully considered or do not appear to reflect 'a broad consensus of opinion' (Mason, Courts and Public Opinion at 36). Decisions will also be informed by the decision-maker's belief based on experience. Evidence will rarely be of any practical assistance.

It will often be impossible for decision-makers to articulate the basis for their determination of what community standards require in a particular case, because the conclusion will not be based on evidence. Nevertheless, decision-makers are members of the community and exposed to the processes of its instrumentalities. They may not always be able to empathise with particular individuals or groups, because of lack of exposure to local considerations, but they are exposed to the short term and long term thinking and dissemination of ideas which determine the way society changes and develops.

Drawing on these considerations, even without detailed analysis of them, in reasons for decision, will lead to better formed judgments which more truly reflect community standards. An assessment expressed to be guided by community standards or values, without more, will still be likely to lead to better decision-making than if no attempt at such an assessment is made. Expressing an opinion that current community standards require a particular outcome will be likely to represent a better decision than one couched in personal terms. Such an approach will sometimes lend itself to reasons. Where there are no reasons, however, the decision and the basis

⁸⁴ [1968] HCA 42; (1968) 117 CLR 390 at 408-409

⁸⁵ [2011] AATA 690; Downes J, President and Senior Member (as he then was) McCabe

for it will still be better expressed than with reasons couched in personal belief.”⁸⁶

55. Although I respectfully suggest that it is implicit in the passage, I think that it should be expressly stated that the task described by the Tribunal is carried out in the context of, in this case, making a decision under s 501(1) of the Migration Act. Therefore, s 501(1) becomes the starting point for identifying those of the Australian community’s expectations that will be relevant. It is the starting point because a decision-maker is under an obligation first to determine the limits of a discretionary power by reference to the subject-matter, scope and purpose of the legislation granting the power to make that discretionary decision.⁸⁷ In other words:

“... the law obliges the Minister, in the particular case, to reach a decision on the merits of that case by reference only to considerations that are relevant to the grant of power and compatibly with the exercise of that power with respect to an individual. ...”⁸⁸

56. The purpose of the Migration Act is to regulate those who may come to and those who may remain in Australia and the circumstances in which they may do so. There are various types of visa, some of which permit a person to remain on a temporary basis and others which permit a person to remain permanently. Parliament has decided that those who have committed offences attracting certain penalties may be refused a visa or have a visa cancelled and, in some instances, must be refused a visa or have a visa cancelled. Against that background, the Minister has developed considerations in the Direction that are consistent with the Migration Act’s subject-matter, scope and purpose.
57. Consistently with the Migration Act, the heart of the Direction is the protection of the Australian community and its institutions. That is reflected in the considerations set out by the Minister for decision-makers exercising one of the three types of discretion dealt with more fully in Parts A, B and C. It is also reflected in paragraph 6 of the Direction when it sets out the Objectives, General

⁸⁶[2011] AATA 690 at [79]-[81]

⁸⁷*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24; 66 ALR 299 at 39-40; 309; per Mason J with whom Dawson J agreed. See also *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* [1979] HCA 62; (1979) 144 CLR 45; 27 ALR 321; 54 ALJR 94 at 49; 325; 95-96 per Stephen, Mason, Murphy, Aickin and Wilson JJ citing with approval *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21; (1947) 74 CLR 492 at 505

⁸⁸*Minister for Immigration v Jia Legeng* [2001] HCA 17; 205 CLR 507; 75 ALJR 679; 65 ALD 1; 178 ALR 421 at [139]; 550; 703; 33; 454

Guidance and Principles all of which underpin the exercise of the particular discretions that are the subject of Parts A, B and C. It is to this paragraph that regard is to be had in determining the matters that underpin and inform paragraph 11.3 when it addresses the expectations of the Australian community in the context of considering whether to exercise the power to refuse a visa. In particular, it underpins and informs when it may be appropriate to revoke the mandatory visa cancellation or when the Australian community would expect that the person should not hold a visa.

58. Particular aspects of paragraph 6 have relevance in considering the expectations of the Australian community in the context of s 501(1). They are:
- (1) The objective of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens: paragraph 6.1(1);
 - (2) In determining whether to exercise the discretion, a decision-maker must have regard to the specific circumstances of the case: paragraph 6.1(3); and
 - (3) The principles set out in paragraph 6.3 reflect community values and standards in determining whether the risk of future harm from a non-citizen is unacceptable: paragraph 6.2(1).
59. The Principles set out in paragraph 6.3 are based on the notions that:
- (1) Entry to and presence in Australia are privileges conferred on persons in the expectation that they are, and have been, law-abiding, will respect its institutions and will not cause or threaten harm to individuals or the Australian community: paragraph 6.3(1);
 - (2) Australia has a low tolerance for any criminal or other serious misconduct but the level of its tolerance in any particular case will be determined by reference to matters such as the nature of the offending or misconduct, the time that a person has been in Australia and the contribution made in the past to the Australian community: paragraphs 6.3(3)-(6); and
 - (3) Regard must be had of the consequences of a visa refusal or cancellation on minor children and other immediate family members: paragraph 6.3(7).

C.2 Consideration: QKVH's circumstances

60. As Direction No. 65 states, the Australian community expects non-citizens to obey its laws while they are in Australia. QKVH has not done that and he has not done that consistently over approximately a two year period. He has not done that

either in relation to its criminal laws or to its migration laws. I have set out the offences of which he has convicted and the table also reflects that he remained in Australia after the expiration of his visa. Even though I accept that QKVH was homeless and would not have received notice of the cancellation, he had an obligation to advise the Minister's Department of his address if were to change it for more than 14 days.⁸⁹ He did not do so. Furthermore, as the holder of a Student (Temporary) (Class TU) visa, he had an obligation to be aware that its terms required him to study. He ceased studying very shortly after he started his degree course at Deakin University because he met Valentina in August 2008 and his Diploma from MIBT was awarded in March 2009. QKVH had some 2½ years to contemplate his visa status before the Department cancelled his student visa but he did nothing to regularise his situation. I find that he and Valentina considered marrying and it is arguable that he could have taken that opportunity to apply for a partner visa. Whether he could have, there is no evidence that he considered the matter.

61. Australia welcomes students to its shores and to its universities, colleges and schools but the Australian community expects that they will comply with the law and with the obligations imposed by the conditions attached to their visas. A student visa is issued to enable students to attend for the specific purpose of studying and for fixed periods. The restrictions can be limiting for a young 19 year old, as QKVH was, who has just left the more protected environment of school and family and wants to enjoy the freedoms of a new country and a new experience. At the same time, those restrictions must be observed because, although the Australian community welcomes them and wants them to enjoy their time in Australia, it also expects them to comply with the law. And the great majority of them do comply with the law. They are young and it is to be expected that some will meet their life partner while they are here and yet they do not distract themselves from their studies and start offending against local laws.
62. QKVH has not met the expectations of the Australian community. As much as there is a great deal of tolerance, and even joy, for those who find love, that tolerance does not extend to overlooking violations of the law be it the criminal law or the migration law. Valentina has a family. On QKVH's evidence, I accept that her relationship with her family has been somewhat volatile as has his with them

⁸⁹ Migration Act; s 52(3B)

but I also accept that they are all reconciled at the moment. In a letter dated 12 May 2017, Valentina's Consultant Psychiatrist, Dr John Cocks, reported that she felt that QKVH's consistent support for her was an essential aspect of her life that kept her well.⁹⁰ I do not have any current evidence as to Valentina's condition although there is nothing to suggest that she has improved. As supportive as QKVH has been to Valentina and even though she may feel that he is an essential aspect of her life, I do not consider that the Australian community would consider her needs of such a nature that QKVH should stay. She was hospitalised in 2017 and, on the evidence I have been given, has been hospitalised at various other times in her life. The medical system will continue to be available to her as it has been while QKVH has been in Australia. She has family with whom she has been reconciled.

Other considerations

63. Paragraph 12 of Direction No. 65 requires me to take into account other relevant considerations. Those considerations include, but are not limited to, international non-refoulement obligations, impact on family members, impact on victims and impact on Australian business interests.

A. Non-refoulement obligations

64. International non-refoulement obligations are the subject of paragraph 12.1. Paragraph 12.1(1) describes a non-refoulement obligation as an obligation not to forcibly return, deport or expel a person to a place where that person will be at risk of a specific type of harm. Paragraph 12.1(1) states:

"A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations to non-citizens in Australia under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT); and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act reflects Australia's interpretation of those obligations and, where relevant, decision-makers should follow the tests enunciated in the Act."

65. A person may make claims which may give rise to international non-refoulement obligations in response to a notice of intention to consider refusing his or her

⁹⁰ Exhibit C

application for a visa under s 501 of the Act. Alternatively, a person's claims might be clear from the facts of the case as would be the case if he or she has applied for a protection visa.⁹¹ Paragraph 12.1(2) states:

*"The existence or non-existence of a non-refoulement obligation does not preclude non-revocation of the mandatory cancellation of a non-citizen's visa. This is because Australia will not remove a non-citizen, as a consequence of the refusal of their visa application, to the country in respect of which the non-refoulement obligation exists."*⁹²

⁹¹ Direction No. 65 at [12.1(3)]

⁹² Whether the final sentence of cl 12.1(2) is consistent with the law as interpreted by the Federal Court has been considered in the context of cl 14.1(2), which is drafted in similar terms. I considered the sentence and the relevant authorities in *Re KQHR and Minister for Immigration and Border Protection* [2018] AATA 684 but there is no need to consider them in this case.

66. Paragraph 12.1(3) provides:

“Claims which may give rise to international non-refoulement obligations can be raised by the non-citizen in a request to revoke under s 501CA the mandatory cancellation of their visa, or can be clear from the facts of the case (such as where the non-citizen held a protection visa that was mandatorily cancelled).”

67. If claims of this sort have been made and a non-citizen is able to make a valid application for another visa if the mandatory cancellation is not revoked, paragraph 12.1(4) states that:

“... it is unnecessary to determine whether non-refoulement obligations are owed to the non-citizen for the purposes of determining whether the cancellation of their visa should be revoked.”

68. Paragraphs 12.1(5) and (6) are concerned with the situation in which the visa that was cancelled was a protection visa. That is not the situation in this case and I will not pursue them further.

A.4 Consideration

69. QKVH has raised concerns that he will be at risk should he be required to return to Pakistan. He has referred to his not being able to receive adequate treatment and support for his mental health in a country in which a mental health condition such as anxiety can be regarded as a stigma. QKVH referred to his no longer identifying as a Muslim anymore but as a humanist and thinks that people should be able to practise religion as they wish. He said that he loves his country but that he does not want to be forced to pray five times a day or to practise some other religion. If he is forced to return to Pakistan, he will be forced to be someone that he is not.

70. While I accept that QKVH has been changed by his experience in Australia and has changed his views about religion, I have not been given any evidence to support a finding that he will be at risk, let alone a serious or significant risk, of a specific type of harm as a result of his changing or changed religious views. The same is true of his mental health condition. I do not have evidence of the conditions in Pakistan or of the treatment of those with mental health issues in that country from which I can draw the conclusion that QKVH would be at risk of a specific type of harm that would attract non-refoulement obligations.

B. Impact on family members

71. Paragraph 12.2(1) of Direction No. 65 states:

“Impact of visa refusal on immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely”.

A.1 Consideration

72. If QKVH is not permitted to remain in Australia, I find on the basis of Dr Cocks' letter dated 12 May 2017 that Valentina would feel that she has lost an essential aspect of her life that has kept her as well as she has been. I do not have any up to date information although I accept QKVH's evidence that they are still together even though he has been in detention. If QKVH were not permitted to remain in Australia, I accept that this would have a significant impact on Valentina.
73. QKVH has friends in Australia and they have stood by him having full knowledge of his history of convictions. AH has been a friend of QKVH since they met at Deakin University towards the end of the second semester in 2009. He knows QKVH as one of the kindest and compassionate people that he knows and as a good and respectable person who only wants to look after fellow human beings. QKVH is not judgmental and is very progressive and a fair-minded person.⁹³ AH's views are consistent with those of his other friends, whom I will call JO and CK, who also gave statements. They will all miss QKVH's fine qualities if he is not permitted to remain in Australia.

B. Impact on victims

74. Paragraph 12.3(1) states:

"Impact of a decision to grant a visa [on members] of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims, where that information is available and can be disclosed to the non-citizen being considered for visa refusal."

B.1 Consideration

75. I do not have any evidence regarding the effect of QKVH's crimes on victims of his criminal behaviour. Apart from other road users and those attending the cinema and the victims of the credit card fraud, the main victims of QKVH's crimes were retail operators and their staff. They should be allowed to conduct their business in an orderly way and without the threat of theft or, as happened on the last occasion, without the threat of a pocket knife being used against a security officer. Other road users and persons attending the cinema should be able to expect that others using the same facilities and venues will conduct themselves lawfully and in an orderly fashion.

C. Impact on Australian business interests

⁹³ Exhibit E

76. Paragraph 12.4 states:

“Impact on Australian business interests if the non-citizen’s visa application is refused, noting that an employment link would generally only be given weight where visa refusal would significantly compromise the delivery of a major project or delivery of an important service in Australia.”

C.1 Consideration

77. Refusal of QKVH’s application for a visa does not have any particular impact on Australian business interests. Although I do not have any written evidence and the offer was made a long time ago,⁹⁴ I accept QKVH’s evidence that he has been offered employment by the Agency for whom he worked before he was placed in immigration detention. I do not, however, have any evidence about whether his role in the Agency is pivotal or whether his not returning to it would have an impact on its business. There is no suggestion that QKVH has particular skills that cannot be provided by other people the Agency may employ in its business either now or in the future. There is no evidence that QKVH’s not being able to work in Australia because he has been refused a visa would have any impact on the Agency’s business or on any other employer’s business. As QKVH has not conducted his own business, I conclude that refusal of his application for a visa would not have an impact on Australian business interests.

CONSIDERATION

78. Having considered both the primary and other considerations as well as the object and underlying policy of the Migration Act, I have decided to affirm the decision made by a delegate of the Minister to refuse QKVH’s application for a Partner (Temporary)(Class UK) and a Partner visa under s 501(1).
79. QKVH had a fine record of voluntary work before he came to Australia and he represented his school. He had a good academic record and he worked at his studies when he arrived. He continued that work when he was employed by Telstra and gave up his time to engage with donors and celebrities on its Telethon. QKVH is to be admired and respected for caring for his girlfriend. He has not walked away from her as many might walk away from a person who has so many needs.
80. In attending to her needs, though, he lost sight of his duties and responsibilities to the wider Australian community. He lost sight of the fact that, if we were to be her long term protector, carer and confidant and even life partner, he had first to make sure that he had his affairs in order. It was not enough to say, as he did from time to time, words to the effect that love conquers all. As much as the Australian community will look kindly upon those

⁹⁴ The offer is referred to in AH’ letter dated 28 November 2016: Exhibit E at 2

who are care deeply for each other, it will not do so if those persons ignore their responsibilities to the other members of the community.

81. QKVH had responsibilities and he chose to ignore them because he wanted to care for her and they were enjoying each other's company. He chose that course when he did not have a permanent visa and he chose it when he had the first wake-up call when he was charged with using an unregistered motor vehicle and driving while his authorisation was suspended. His offending started there and continued as I have described. It was a course of offending that showed disregard for the law even when he had the right to work but did not. His reasons for not working centre on Valentina's needs but QKVH made a choice about ignoring his responsibilities to the wider community. There is a real risk that he would go down the same path if he were faced with hardship and the potential for harm to members of the community outweighs his interests and those of Valentina. As hard as it is for him and for Valentina to be parted by being in different countries, I have decided that the interests of the Australian community lie in QKVH's not being permitted to be a member. They lie in his being refused a visa.

DECISION

82. I have decided that the delegate's decision to refuse to grant QKVH a Partner (Temporary) (Class UK) visa under s 501(1) of the Migration Act should be affirmed.

I certify that the preceding eighty two [82] paragraphs are a true copy of the reasons for the decision herein of

Deputy President S A Forgie.

.....[sgd].....

Associate

Dated: 20 June 2018

Date of hearing:

6 April 2018

Counsel for the Applicant

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Solicitor for the Applicant:

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